

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2003-158-C - ORDER NO. 2005-5  
JANUARY 7, 2005

IN RE: Application of FTC Communications, Inc. DBA    ) ORDER  
FTC Wireless for Designation as an Eligible        )  
Telecommunications Carrier Pursuant to            )  
Section 214(e)(2) of the Communications Act of    )  
1934.    )

**I. PROCEDURAL BACKGROUND**

This matter comes before the South Carolina Public Service Commission (“Commission”) upon the petition of FTC Communications, Inc., d/b/a FTC Wireless (“FTC”) for designation as an Eligible Telecommunications Carrier (“ETC”), pursuant to 42 U.S.C. § 214(e)(2), for the purpose of receiving federal universal service funding.

A public hearing was held in this matter on September 15, 2004. FTC was represented by William E. DuRant, Jr., and Stephen G. Kraskin. FTC presented the direct testimony of Wilmot E. McCutchen.

The Consumer Advocate was represented by Elliott F. Elam, Jr. The Consumer Advocate presented no witnesses.

The South Carolina Telephone Coalition (“SCTC”) was represented by M. John Bowen, Jr., and Margaret M. Fox. The SCTC presented the direct testimony of Glenn H. Brown and of H. Keith Oliver.

The Commission's Staff was represented by F. David Butler. The Commission Staff presented the direct testimony of James M. McDaniel.

## II. DISCUSSION

This docket was established to consider FTC's petition to be designated as an ETC for purposes of receiving federal USF. Section 254(e) of the federal Telecommunications Act provides that only an ETC as designated under Section 214(e) of the Act may receive federal universal service support. This is the first such petition to be addressed by the Commission.<sup>1</sup>

The goal of universal service is to ensure the widespread availability of affordable basic local exchange telephone service. Universal service has long been a public policy. See, e.g., 47 U.S.C. § 151, § 254; see also S.C. Code Ann. § 58-9-280(E), Commission Order No. 2001-419 in Docket No. 97-239-C at pp. 25-31 (Section III, Universal Service Policy and History). Any consideration of a petition to designate an ETC for purposes of receiving federal funds intended to preserve and advance universal service should be undertaken in a manner consistent with these overall goals.

Section 214(e) requires that a telecommunications carrier seeking designation as an ETC must offer the services that are supported by federal universal service support mechanisms, and must advertise the availability of those services and the charges therefor using media of general distribution.

The FCC has defined the services that are supported by Federal universal service support mechanisms to include the following nine (9) core services:

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<sup>1</sup> The Commission held a hearing on a prior application filed by ALLTEL Communications, Inc. in Docket No. 2003-151-C, but ALLTEL withdrew the application before the Commission issued a final order in the case.

1. voice grade access to the public switched network;
2. local usage;
3. touch tone service;
4. single party service;
5. access to emergency services;
6. access to operator services;
7. access to interexchange service;
8. access to directory assistance; and
9. toll limitation.

47 C.F.R. § 54.101(a), (b). These nine services must be offered throughout the service area for which the designation is received, and must be offered using either the ETC's own facilities or a combination of its own facilities and resale of another carrier's services. 47 U.S.C. § 214(e)(1). The requirement that a carrier "offer" the service does not mean that it must actually provide ubiquitous service prior to certification as an ETC and, in fact, the Commission cannot place such a condition on a carrier prior to certification. See, e.g., Federal State Joint Board on Universal Service, RCC Holdings, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, Memorandum Opinion and Order, DA 02-3181 (Wireless Comp. Bureau, rel. Nov. 27, 2002).

Section 214(e)(2) of the Act sets forth the analysis a state commission must perform in designating ETCs as follows:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible

telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

While the states are free to establish their own public interest tests, in instances where states have declined to exercise jurisdiction, pursuant to Section 214(e)(6), the FCC has applied a public interest analysis. Initially the FCC's standard was very lenient, and the FCC granted applications for ETC status based solely on a generalized statement by the applicant that doing so would bring the benefits of competition to the designated area. See, e.g., Guam Cellular and Paging, Inc., DA 02-174 (rel. January 12, 2002). This led to a general concern about exponential growth in the size of the federal USF, as well as a specific concern that the FCC's policy was not consistent with the intended use of universal service funding in high cost areas. As FCC Commissioner Martin has stated:

I have some concerns with the [FCC's] policy . . . of using universal service support as a means of creating "competition" in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund.

Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, Federal-



State Joint Board on Universal Service, CC Docket No. 96-45, Fifteenth Report and Order, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, CC Docket No. 98-77, Report and Order, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 98-166, Report and Order, Separate Statement of Commissioner Kevin J. Martin, 16 FCC Rcd 19613, 19770 (2001).

More recently, the FCC has developed and applied a more stringent public interest analysis. See In the Matter of Federal State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order, FCC 03-338, CC Docket No. 96-45 (rel. January 22, 2004) (“*Virginia Cellular*”); In the Matter of Federal State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order, FCC 04-37, CC Docket No. 96-45 (rel. April 12, 2004) (“*Highland Cellular*”). In these orders, the FCC clearly stated that the burden of proof was on the applicant to demonstrate that the public interest would be served by granting the application. *Virginia Cellular* at ¶ 26; *Highland Cellular* at ¶ 20. According to the FCC, the value of competition alone is not sufficient to satisfy the public interest test in rural areas. *Virginia Cellular* at ¶ 4; *Highland Cellular* at ¶ 4. The determination of public interest instead requires a fact-specific balancing of the benefits and costs. *Virginia Cellular* at ¶ 28; *Highland Cellular* at ¶ 22. Factors that should be considered include: The benefits of increased competitive choice; the impact of multiple ETC

designations on the universal service fund; whether the benefits of an additional ETC outweigh any potential harms; the unique advantages and disadvantages of the competitor's service offering; any commitments regarding quality of service; and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. *Virginia Cellular* at ¶ 28; *Highland Cellular* at ¶ 22. The Acting Chief of the Wireline Competition Bureau, through delegated authority, reiterated these principles in a subsequent order, although the Bureau Chief appeared to apply the standards in a more lenient manner than had been used by the full FCC in the *Virginia Cellular* and *Highland Cellular* matters. See In the Matter of Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the States of Alabama, Florida, Georgia, New York, and Tennessee, and in the Commonwealths of Pennsylvania and Virginia, Order, DA 04-2667, CC Docket No. 96-45 (rel. August 25, 2004) ("*Nextel*").<sup>2</sup>

The FCC has clearly recognized that there are problems with the federal USF support mechanism. In addition to moving toward applying a more stringent public analysis test for ETC applicants, the FCC recently directed the Federal-State Joint Board on Universal Service to review numerous competitive universal service issues, including the process for designating ETCs and the methodology for calculating support in competitive study areas. See In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 02-307 (rel. November 8, 2002). In its

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<sup>2</sup> An application for review of the *Nextel* decision by the full FCC was filed by a group of rural local exchange carriers on September 24, 2004. The application for review is pending.

Recommended Decision, the Federal-State Joint Board on Universal Service (“Joint Board”) also encouraged state commissions to conduct rigorous reviews of ETC applications, including fact-intensive analysis. See In the Matter of Federal-State Joint Board on Universal Service, Recommended Decision, FCC 04J-1, CC Docket No. 96-45 (rel. February 27, 2004) (“*Recommended Decision*”) at ¶ 11. The Joint Board recommended adopting a core set of minimum qualifications for ETCs, to include existing minimum eligibility requirements and the following additional minimum eligibility requirements: (i) adequate financial resources; (ii) commitment and ability to provide the supported services; (iii) ability to remain functional in emergencies; (iv) consumer protection; and (v) local usage. See Recommended Decision at ¶¶ 21-36. According to the Joint Board, while these minimum eligibility requirements will assist states in ensuring that additional ETCs are able and willing to serve all customers in the designated service area upon reasonable request, it is still incumbent upon the states to make a public interest determination before granting requests for designation of additional ETCs. *Recommended Decision* at ¶ 37. The Joint Board’s recommendation has not yet been adopted by the FCC. However, Joint Board Chair and FCC Commissioner Kathleen Abernathy encouraged states to use the guidelines in the interim, and the guidelines are consistent with the requirements set forth by the FCC in *Virginia Cellular* and *Highland Cellular*. See TR. at 69-70.

While we agree that the FCC is moving in the right direction in examining these issues and in applying a more fact-specific and stringent public interest analysis, we note that we are not bound by the FCC’s analysis, but instead have the obligation to fulfill the

statutory mandate of Congress as well as our own statutory mandate by ensuring that designating additional ETCs in South Carolina serves the public interest, convenience and necessity. Certainly with respect to rural areas, Congress has expressed an affirmative mandate for the Commission to do so, and has given the Commission the discretion as to whether or not to designate multiple ETCs in such areas.

Protection of the public interest may involve not only an initial public interest determination with respect to a request for ETC designation by a common carrier, but also the imposition of requirements on that ETC to ensure that such designation advances universal service, as intended, and to ensure that ETCs are treated in a competitively-neutral and non-discriminatory fashion by the Commission. The Commission has the authority to impose such additional requirements on carriers it designates as ETCs in South Carolina. In a 1999 opinion, the Fifth Circuit Court of Appeals reversed a portion of an FCC order<sup>3</sup> wherein the FCC held that state commissions were not permitted to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal USF. Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5<sup>th</sup> Cir. 1999) (“TOPUC”). The Court stated that the FCC had:

erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support. The plain language of the statute speaks to the question of how many carriers a state commission may designate, but nothing in the subsection prohibits the states from imposing their own eligibility requirements. This reading makes sense in light of the states' historical role in ensuring service quality standards for local service. Therefore, we reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support.

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<sup>3</sup> In re Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45 (rel. May 8, 1997).

TOPUC, 183 F.3d at 418 (footnote omitted) (emphasis added); see also TR. at 189, citing In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as a Local Exchange Service, WT Docket No. 00-239, Memorandum Opinion and Order, FCC 02-164 (rel. August 2, 2002), at para 6, and Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

More specifically, the Commission has the authority to decide whether carriers should be required to offer unlimited local usage in order to qualify as an ETC. The FCC recently declined to add unlimited local usage to the list of supported services, but only because the FCC felt that doing so would hinder the ability of state Commissions to require other local usage offerings (e.g., local metered pricing) in cases where the state Commission determines such offerings may better serve the public interest. The FCC concluded that adding a national local usage requirement would preclude experimentation by the states, and stated that “states are in a better position to determine whether unlimited local usage offerings are beneficial in particular circumstances.” Order and Order on Reconsideration, In the Matter of Federal-State Joint Board on Universal Service, FCC 03-170 (rel. July 14, 2003), at ¶ 14.

Likewise, while the Commission cannot require a carrier to demonstrate the ability to provide ubiquitous service throughout the service area prior to designation as an ETC, there is nothing to prevent the Commission from monitoring the ETC after designation to ensure that it is taking the steps necessary to meet its statutory obligation

to “offer” – i.e., actually have the capability to provide – service throughout the service area.

We are mindful that we cannot regulate the entry of or the rates charged by wireless service providers. See 47 U.S.C. § 332(c)(3). We note, however, that imposing conditions on ETCs who happen to be wireless carriers does not constitute regulation of their CMRS service as such. These carriers are free to establish whatever services and rates they wish for their CMRS offerings in South Carolina. It is these carriers’ universal service offerings alone that we are interested in – those that will be eligible for universal service funding that will be financed in part by South Carolina’s citizens. We believe it is appropriate to regulate the basic universal service offerings of those CMRS providers who voluntarily come before this Commission to request designation as an ETC in South Carolina, a designation that will allow them to receive significant amounts of funding for the provision of universal service in South Carolina. Two of the goals of universal service are to ensure just, reasonable and affordable rates for service and to ensure comparability of service between urban and other (rural, insular and high cost) areas. See 47 U.S.C. § 254(a). It is difficult to grasp how this Commission may determine whether a carrier is entitled to universal service funding without at least taking into consideration the rates the carrier intends to charge for its alleged universal service offerings. It is this Commission’s obligation to ensure that ETCs are indeed providing “universal service” – basic local exchange service at affordable rates – and that any ETC designation we make serves the interest of the citizens of South Carolina.

Other states have considered ETC applications. As with the FCC, other states' analyses are not binding on this Commission. However, we note that recent decisions seem to suggest a turning tide with respect to states performing more detailed reviews and public interest analyses of ETC applications. See, e.g., In the Matter of the Application of Missouri RSA No. 7 Limited Partnership, d/b/a Mid-Missouri Cellular, for Designation as a Telecommunications Company Carrier Eligible for Federal Universal Service Support Pursuant to Section 254 of the Telecommunications Act of 1996, Report and Order, Case No. TO-2003-0531 (Public Service Commission of the State of Missouri, issued August 5, 2004); Application of WWC License L.L.C., d/b/a CellularOne, for redefinition of its service area as a designated Eligible Telecommunications Carrier, Compliance Order, Docket No. 04-3030 (Public Utilities Commission of Nevada, August 12, 2004) (state commission orders denying applications for ETC designation and citing failure to meet *Virginia Cellular* and *Highland Cellular* standards).

In another recent state decision, the Nebraska Public Service Commission denied a request from a wireless carrier requesting ETC designation, finding the applicant had not sufficiently proven that designation was in the public interest. In the Matter of the Application of Amended NPCR, Inc., d/b/a Nextel Partners, Eden Prairie, Minnesota seeking designation as an eligible telecommunications carrier that may receive universal service support, Application No. C-2932, Order Denying Application (Nebraska Public Service Commission, entered February 10, 2004), at 6. The Nebraska Commission found there was "no indication that a designation in the present case would lead to 'increased'

competition,” noting that the applicant “is already providing the wireless service throughout its licensed territory in Nebraska.” *Id.* at 7. An excerpt from the order is in line with arguments made by the SCTC in the current matter:

In light of the current environment, we find that the real issue to consider is whether Applicant’s competitive efforts in the proposed territory should be subsidized by payments from the federal USF. We find they should not. As the Applicant’s case demonstrates, no federal subsidy is necessary to bring Applicant’s service to the rural areas. Applicant is already serving the rural areas and bringing new technologies to these areas without the assistance of a federal subsidy. We further believe an ETC designation would not place Applicant on a level playing field with the incumbent carriers. Rather, a grant of the application would grant to the Applicant distinct advantages over the incumbent carriers, jeopardizing their ability to serve all of their subscribers adequately and jeopardizing the principles set forth in section 254 [of the Act.] . . . Consumers in the proposed territory are already receiving telecommunications services from the Applicant without additional costs. If this application is granted, consumers would be required to bear the additional costs necessary to subsidize the service provided by the Applicant. Accordingly, we find that the public costs in granting an ETC designation in the territory served by the rural carriers outweighs any supposed benefits offered by Applicant.

*Id.* at 9.

While the FCC is taking steps to address concerns with the future viability of the federal USF, this Commission still has an obligation to follow the statutory mandate of Congress and ensure that we are taking the necessary steps to ensure that any ETC designations we make will not harm the public interest. Before designating any carrier as an ETC in South Carolina, we must carefully consider its application; make an affirmative finding that it is in the public interest to designate that carrier as an ETC, particularly with respect to service in rural areas; and adopt reasonable and rational requirements to ensure that any carriers we may designate as ETCs in South Carolina will



use the federal USF funds they receive to preserve and advance the goals of universal service.

### **III. SUMMARY OF TESTIMONY**

#### **WILMOT E. McCUTCHEN**

Mr. McCutchen, Chief Operating Officer of FTC Communications, Inc. d/b/a FTC Wireless, testified on behalf of FTC. Mr. McCutchen testified that FTC is a wireless carrier providing Personal Communications Services (“PCS”) to the South Carolina counties of Clarendon, Lee, Sumter and Williamsburg and to certain portions of Florence and Georgetown Counties. TR. at 10. FTC’s ultimate parent owner is Farmers Telephone Cooperative, Inc. (“Farmers Cooperative”). TR. at 11.

According to Mr. McCutchen, FTC seeks status as an ETC in order to advance universal services in the areas of rural South Carolina where it has demonstrated commitment of service to its customers and community member owners. TR. at 11. FTC seeks designation for its entire service area in South Carolina, which covers the entire study area of Farmers Cooperative and a portion of the service territory of Verizon South, Inc., a non-rural telephone company. TR. at 16. Mr. McCutchen testified that FTC currently provides or will provide, upon designation, all of the supported services set forth by the Federal Communications Commission (“FCC”) for designation as an ETC. TR. at 12-13. According to Mr. McCutchen, FTC is a “common carrier” for purposes of obtaining ETC designation pursuant to Section 214(e)(1) of the Act. TR. at 12-13. In addition, Mr. McCutchen stated that FTC will meet whatever minimum usage requirements may subsequently be adopted by the FCC or the Commission, and that FTC

will offer Lifeline and Linkup services to eligible low-income consumers and provide toll limitation services at no charge for qualifying low-income customers as part of its universal service offerings. TR. at 13.

Mr. McCutchen described FTC's wireless coverage, which currently utilizes seventy-five (75) cell sites located approximately five miles apart in various parts of its licensed area. TR. at 14. He testified that FTC is committed to provide service throughout its service area to all customers making a reasonable request and intends to pursue its build out plans for areas where facilities are not yet present. TR. at 14. According to Mr. McCutchen, universal service support will enable FTC to significantly enhance service in areas already served and expand coverage into unserved areas. TR. at 14. FTC also plans to expand its emergency restoration capabilities with high cost support. TR. at 14-15.

Mr. McCutchen pre-filed three attachments with his testimony, which were collectively designated as Hearing Exhibit No. 1. The first attachment (Attachment A) is a detailed listing of wireless plans currently offered by FTC. Attachment B is a map showing FTC's current Radio Frequency (RF) coverage. Attachment C is a map indicating the additional sites required to achieve FTC's goal of 100% coverage in FTC's licensed area. Mr. McCutchen testified that FTC utilizes all digital switching and transmission facilities, and that each cell site is equipped with backup battery support to provide an average of two hours continuous operation in the event of power interruption. TR. at 15. According to Mr. McCutchen, FTC customers receive a high level of service that meets the highest of wireless industry standards. TR. at 15.

Mr. McCutchen testified that the Commission could, without any further finding, designate FTC as an ETC with respect to Verizon's non-rural area. TR. at 16. Mr. McCutchen acknowledged that, when designating an ETC in rural areas, the Commission must first make a determination that the designation is in the public interest. TR. at 17. Mr. McCutchen testified that designating FTC as an ETC in the rural area served by its parent, Farmers Cooperative, is consistent with the public interest and the reasons why FTC decided to provide wireless service in those rural areas. TR. at 17. Mr. McCutchen testified that customers in FTC's service area would receive the benefits of increased wireless coverage as well as increased choices of service providers, innovative services, and new technologies. TR. at 17. Consumers would also accrue public safety benefits as FTC expands its network because FTC provides basic 911 service to all of its subscribers and roamers. TR. at 18. Mr. McCutchen testified that the benefits of designating FTC as an ETC outweigh the costs because the costs will be spread out across the entire nationwide body of telecommunications carriers and their customers. TR. at 19. Mr. McCutchen stated that designating FTC as an ETC would not result in FTC receiving a windfall because of the non-profit status of FTC's parent company and because FTC would be required to certify to the Commission annually that it is using universal service funds for the proper purpose. TR. at 22.

After Mr. McCutchen provided his testimony at the hearing, he stated on redirect examination that FTC would comply with all service standards to the extent they are applicable to wireless and can be made to fit wireless. TR. at 53. He further committed that FTC would provide annual progress reports to the Commission on build-out plans,

unfulfilled service requests, and complaints. Tr. at 54. He stated that FTC would specifically commit to provide service to requesting customers in the area for which it is designated, and to construct new cell sites in areas outside its network coverage. TR. at 54-55.

GLENN H. BROWN

The SCTC presented the testimony of Glenn H. Brown, President of McLean & Brown, a consulting company that specializes in rural telephony issues, including universal service and intercarrier compensation.

Mr. Brown summarized the key elements of Section 214(e) of the Act and FCC Rule 54.201, which require public interest findings before designating multiple ETCs. TR. at 66. While neither the statute nor the FCC regulation say how this determination should be made, according to Mr. Brown, the FCC has issued orders in the *Virginia Cellular* and *Highland Cellular* cases that provide definitive guidelines for states to use in performing this important determination. TR. at 66-67. Mr. Brown summarized those orders and the factors to be considered, and pointed out that the burden was on the applicant. TR. at 67, 71.

Mr. Brown disagreed with Mr. McCutchen's statement that the Commission could designate FTC as an ETC in Verizon's service area "without any further finding," and testified that, to the contrary, the FCC in *Virginia Cellular* set forth a more rigorous standard for state Commission review. TR. at 68. According to Mr. Brown, FTC had not met this standard. TR. at 68, 92. According to Mr. Brown there may be a question regarding whether FTC is serving only the lower cost portions of the Verizon study area,

yet asking to receive high-cost support based upon the more costly parts of the study area that it does not serve. TR. at 92.

Mr. Brown testified that other states have already applied the more stringent requirements set forth in recent FCC orders and have denied applications for ETC designation based on the more stringent public interest test. TR. at 72-73. Mr. Brown testified that the reason the FCC is applying more stringent standards is because of concern over the growth in the size of the federal Universal Service Fund. See TR. at 72. The Joint Board's recommendation that the FCC consider limiting support to only the customer's "primary line" generates even more concern from a public interest standpoint. See TR. at 73-74. A primary line rule would impact the ETC designation process by significantly raising the stakes of designating multiple ETCs in sparsely populated rural areas. TR. at 73. A wireline carrier that had made investment to provide high-quality service throughout its service area would see the cash flow needed to support and maintain that investment diminished, perhaps impacting its ability to continue serving customers, and certainly impacting its willingness to make new investment with the prospect of uncertain returns. TR. at 74. According to Mr. Brown, with the possibility that the FCC will adopt a primary line rule or some other method of capping federal universal service funding, state commissions must carefully evaluate what areas are capable of supporting multiple subsidized competitors. TR. at 74, 76. If current federal funding levels are capped, and that capped funding base is divided among two or more network providers, it is possible that no provider would have adequate financial resources to continue to invest to provide affordable service to remote rural consumers. TR. at 74.

Mr. Brown testified as to the costs that would be incurred if FTC's request for ETC designation is granted. The most easily identified cost is the cost of providing support to the new ETC, which in this case is approximately \$1 million per year. TR. at 79, 80. However, once one carrier is designated as an ETC, other carriers serving the market will have to do the same in order to remain competitive, which would significantly increase the cost. TR. at 79, 80-81. Mr. Brown estimated that the overall impact on federal USF if all wireless carriers in the state of South Carolina were to receive ETC status could be approximately \$75.7 million per year. TR. at 80. The nationwide impact would be over \$2 billion per year. TR. at 80. In addition, according to Mr. Brown, in sparsely populated areas there could also be increased public costs due to the loss in network efficiency caused by multiple providers serving in a less efficient manner than a single provider could serve. TR. at 79, 83-87.

Mr. Brown testified that FTC has not made the requisite showing that any benefits would outweigh the significant costs associated with designating FTC as an ETC. TR. at 87. First, FTC has made only generalized statements regarding the generic benefits of competition and wireless service. TR. at 87. Because FTC is already providing wireless service today, the real question is what *additional* competition and *increased* benefits will come from designating FTC as an ETC in the requested service areas. TR. at 87-88. Furthermore, according to Mr. Brown, even if FTC could demonstrate additional benefits, these may well be temporary because FTC has not addressed the very real risks that spreading finite universal service resources too thin will create to critical "carrier of last resort" principles. TR. at 88. Mr. Brown pointed out that FTC had added 15 towers

in less than a year without federal support, and there is no reason to believe FTC needs universal service funding to add the remaining 45 towers it proposes to cover the service area. TR. at 90.

Mr. Brown concluded that FTC had not met its required burden of proof that its application for ETC status is in the public interest; that designation of FTC will create significant new public costs and deliver very few, if any, incremental public benefits; and that designation of FTC as an ETC is likely to cause significant harm to South Carolina rural telephone companies and the customers they serve, particularly in light of recent concerns and developments due to the significant growth in the federal universal service fund. TR. at 93-94.

H. KEITH OLIVER

The SCTC also presented the testimony of H. Keith Oliver, Vice President of Accounting and Finance, for Home Telephone Company, Inc. Mr. Oliver testified that FTC's request for designation as an ETC should be denied because FTC has not demonstrated that the public benefits of such a designation, and the receipt of universal service support associated with such a designation, outweigh the public costs that would result from such a designation. TR. at 169. In fact, as Mr. Oliver testified, designating FTC as an ETC will very likely have adverse consequences to customers in rural areas. TR. at 150. Chief among the SCTC's concerns is the impact such designation would have on the size of the federal universal service fund program. TR. at 150. Explosive growth in the federal Universal Service Fund is threatening the long-term viability of the fund, thereby jeopardizing the continued provision of affordable basic local exchange

service to rural subscribers. TR. at 150. According to Mr. Oliver, the SCTC is also concerned that support will be afforded to a carrier that is not providing the same quality or level of service that customers are accustomed to receiving from companies who are current recipients of the fund. TR. at 150. Mr. Oliver testified that the SCTC is concerned that approval as a federal ETC provider is likely to have a major impact on the State USF. TR. at 150.

Mr. Oliver described the different federal USF funding mechanisms and how the amount of support is calculated for incumbent LECs under each funding mechanism. TR. at 151-154. Federal USF for rural ILECs is based on their embedded cost of providing service and is a cost recovery mechanism for those ILECs. TR. at 157, 158. Each component of federal USF is based on specific actual costs incurred by the rural incumbent LEC or is intended to replace specific revenues previously received by the rural incumbent LEC. TR. at 153-154. Competitive ETCs, on the other hand, are not required to provide any cost justification; they simply recover the same funding as the incumbent LEC, regardless of their costs. TR. at 157.

According to Mr. Oliver, the federal USF has been greatly expanded for things such as schools and libraries, rural health care, etc. TR. at 154-55. While these programs may well be worthwhile, the additions have doubled the size of the fund and have led to surcharges on customer bills approaching 10%. TR. at 155. This in turn has led to a proceeding before the FCC to reconsider many fundamental issues relating to the federal USF, including addressing ways in which the FCC can limit the size of the fund. TR. at 155.



Mr. Oliver testified that universal service funding is intended to ensure the provision of basic local service to rural customers at affordable rates that are comparable in quality, service and price to urban areas. TR. at 156. According to Mr. Oliver, however, FTC is not providing the same service as the incumbent LECs. TR. at 156. ILEC's are required to offer stand-alone basic local service with unlimited local calling at a rate approved by the Commission (the statewide average rate is \$14.35 for residential customers), and ILECs are also subject to quality of service standards, which require detailed reporting. TR. at 156.

Mr. Oliver testified that FTC is already providing wireless service throughout its service area within the State of South Carolina and has been doing so, without federal USF support. TR. at 157. FTC built its current network and acquired its current customer base without the expectation of universal service funding, and any funding received for its existing customer base would be a windfall for the company. TR. at 158.

Mr. Oliver also testified that granting FTC's request to be designated as an ETC could have a major impact on State USF. TR. at 159. According to Mr. Oliver, if FTC gains ETC status, the next logical argument is that it is entitled to receive State USF, particularly in light of the fact that FTC will be required to pay into the State USF once it is designated as an ETC. TR. at 159-160.

Mr. Oliver testified that designation of FTC as an ETC will not advance universal service, because universal service is already available in the area in question. TR. at 160. FTC's parent company, Farmers Cooperative, offers high quality advanced telecommunications services throughout the area for which FTC requests ETC

designation. TR. at 160. Providing customers with another wireless option is not the same thing as advancing universal service. TR. at 160.

Mr. Oliver testified that the Commission has the authority to establish whatever level of local usage it deems appropriate for an ETC, up to and including unlimited local usage. TR. at 161. According to Mr. Oliver, existing ETCs (*i.e.*, incumbent LECs) currently are required to offer unlimited local usage as a basic service offering, and this is exactly the level of usage that should be required of all ETCs that will receive the same funding as the ILEC. TR. at 161. Mr. Oliver further testified that allowing the use of federal universal service funds to upgrade wireless networks to provide broadband services, as Mr. McCutchen suggested, would be a violation of current rules. TR. at 162-163.

Mr. Oliver testified in detail about the SCTC's concerns with the primary line recommendation of the Joint Board and the loss of funding rural ILECs, who also serve as carriers of last resort, could face. TR. at 165-166. Mr. Oliver stated that even the Joint Board expressed concern that the splitting of support could lead to a situation where no provider can recover sufficient support to serve in a high cost area. TR. at 166-168. He also testified that granting FTC's request would open the door for similar requests by competitive carriers seeking ETC designation and associated federal funding. TR. at 168. It would be all but impossible for the Commission to deny ETC status to other wireless providers operating in rural South Carolina, and that would threaten rural ILECs' ability to operate throughout their rural high cost service areas. TR. at 168-169.

Mr. Oliver concluded that the Commission should deny FTC's request for designation as an ETC in South Carolina, because FTC has not demonstrated that the public benefits of such a designation, and the receipt of universal service support associated with such a designation, outweigh the public costs that would result from such a designation. TR. at 169.

JAMES M. McDANIEL

The Commission Staff presented the testimony of James M. McDaniel, Chief of the Telecommunications area of the Utilities Department. Mr. McDaniel provided information for the Commission to consider in its review of wireless carriers seeking designation as ETCs and made certain recommendations concerning requirements for wireless ETCs.

With respect to FTC's application specifically, Mr. McDaniel testified that it would be difficult for the Commission to make a complete public interest finding in this case because FTC did not provide specific wire center information. TR. at 229. According to Mr. McDaniel, the public interest analysis is a very important issue. TR. at 229. He testified that the FCC, in the *Virginia Cellular* and *Highland Cellular* cases, required the carriers to provide population density information for each of the wire centers in which the companies sought to provide services as an ETC. TR. at 229. That information was not provided by FTC. TR. at 229. Mr. McDaniel stated that, pursuant to the *Highland Cellular* order, the burden of proof lies with the carrier seeking ETC designation. TR. at 229.

With respect to wireless carriers requesting ETC designation generally, Mr. McDaniel summarized important factors to be considered by the Commission, as included in a report conducted by Curry and Associates at the Commission's request. These factors are:

- Wireless ETC Designation Requirements are Not Limited to FCC Rules
- Analysis of Public Interest is Critical
- The Commission Can Direct the Use of USF Monies; and
- Verification of Use of USF Monies Should Expand.

TR. at 227-228. Mr. McDaniel further testified as to Staff's recommendations. Staff recommended that the Commission require wireless ETCs to comply with the Commission's customer relations regulations, power reliability standard established for LECs, and any reasonably applicable quality of service regulations. TR. at 228. The Staff also recommended that the Commission require ETCs to provide specific plans setting out in detail how USF funds are to be used, and that the Commission retain authority to modify ETC's plans and direct how USF monies are used as well as the time period for use of the funds in build out plans. TR. at 228. Staff also recommended that the Commission require wireless ETCs to provide information, including maps, regarding the service areas in which they seek ETC designation, as well as specific information regarding customer population density, amount of federal USF support, and cost of providing service on a wire center basis for the entire area in the State for which the carrier seeks ETC designation. TR. at 229.

Counsel for the Commission Staff requested that the Commission take judicial notice of the document referred to in Mr. McDaniel's testimony entitled Review of Public Policy Considerations Raised by Wireless Eligible Telecommunications Carrier (ETC) Applications, which was a study commissioned by the Commission, conducted by Curry and Associates, and provided to the Commission on May 12, 2004. The request was granted. TR. at 237.

#### MOTION TO DISMISS

At the close of FTC's case, counsel for SCTC made a motion for a directed verdict on the basis that FTC had not fulfilled its responsibility to place all matters in the record necessary for the Commission to approve the application. TR. at 56. FTC's counsel responded that FTC, on briefing, could demonstrate that the facts support the grant of the designation. TR. at 58. The Commission voted to deny the motion and proceed with the case. TR. at 59-60. Counsel for SCTC renewed the motion at the end of the proceeding. TR. at 248.

#### **IV. FINDINGS AND CONCLUSIONS**

1. The Commission has jurisdiction, pursuant to S.C. Code Ann. § 58-3-140 and § 58-9-720, and authority under Section 214(e)(2) of the Act, to make a determination regarding FTC's application for designation as an ETC for purposes of receiving federal USF.
2. FTC is a common carrier, as that term is defined in 47 U.S.C. § 153(10).
3. Section 214(e)(2) of the Act allows the Commission discretion in all ETC designation cases to consider the public interest, convenience and necessity.

4. Pursuant to the statutory standard set forth in Section 214(e)(2) of the Act, the Commission “may,” but is not required to, designate more than one carrier as an ETC for a service area served by a rural telephone company.

5. With respect to areas served by rural telephone companies, before the Commission may designate additional ETCs to serve such areas, Section 214(e) of the Act requires that the Commission make an affirmative finding that such designation is in the public interest.

6. In addition to the initial threshold public interest finding, the Commission has the authority to impose additional requirements on carriers it designates as ETCs in South Carolina. Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5<sup>th</sup> Cir. 1999). In particular, the Commission has the authority to require ETCs to offer a basic local service plan that includes a minimum amount – or even an unlimited amount – of local usage. See Order and Order on Reconsideration, In the Matter of Federal-State Joint Board on Universal Service, FCC 03-170 (rel. July 14, 2003), at para. 14.

7. We agree with witnesses for the SCTC and the Commission Staff that the factors delineated in the FCC’s *Virginia Cellular* and *Highland Cellular* orders are appropriate considerations in determining whether the public interest is met by a particular request for designation as an ETC. We find these factors useful in guiding our consideration of the public interest determination required for ETC applications, particularly with respect to rural telephone company service areas. This requires us to conduct a specific, fact-intensive analysis to determine whether the benefits associated with the designation will outweigh the public costs.

8. Universal service funding is intended to ensure that consumers in all regions of the nation have access to quality telecommunications services at just, reasonable, and affordable rates, and that the services and rates in rural, insular, or high cost areas are comparable to those in urban areas. 47 U.S.C. § 254(b); see also TR. at 156. In determining whether granting a request for designation as an ETC serves the public interest, we must keep in mind this overriding principle.

9. Federal USF is a cost recovery mechanism for incumbent LECs. TR. at 157-158. The various programs that make up the federal USF were designed to accomplish specific objectives, such as ensuring rural consumers had access to affordable basic local exchange telephone service. TR. at 153-154, 156. FTC's wireless network, on the other hand, was built, and its current customer base acquired, without the expectation of universal service funding. See TR. at 41-42, 47, 50. The initial build out of FTC's wireless network was undertaken with the expectation that the enterprise would be profitable, and was undertaken without contemplating the receipt of universal service funds. TR. at 41-42, 47, 50, 158.

10. The real issue for us to decide is not whether FTC will improve its network with any federal USF monies received, but whether FTC's competitive efforts should be subsidized by payments from the federal USF. We find they should not. FTC is already serving the area in question. TR. at 10-11, 157. FTC has already brought new services and technologies to the area without federal funding. TR. at 13. FTC has already built seventy-five towers in its service area, including 15 towers within the past year, all without federal funding. TR. at 14, 141-142. There is evidence in the record

that at least two other wireless carriers provide service in the area, including providing signal in those areas where FTC has proposed to build new towers. TR. at 99-100. In addition, there are two incumbent local exchange carriers, Verizon South and Farmers Cooperative, which together serve FTC's entire service area and stand ready and willing to serve as carriers of last resort throughout the area. See TR. at 101, 160.

11. We are troubled by several other public interest issues that arose during the course of the hearing. First, in response to questions from this Commission regarding whether a wireless carrier can serve as a carrier of last resort, SCTC witness Mr. Brown and Staff witness Mr. McDaniel expressed doubt, and indicated that was one of the things the Commission should take into consideration. See TR. at 139, 244. Second, FTC suggested that customer service and the public interest would be served because FTC's customers own FTC in the sense that FTC is a subsidiary of Farmers Cooperative, which is owned by its members. See TR. at 33. Yet, Mr. McCutchen also stated that 50% of FTC's customers are located in Verizon's service area. TR. at 30. Verizon customers are not Farmers Cooperative members. Finally, we are troubled by FTC's statement that wireless plans are migrating to nationwide plans with buckets of minutes that include "toll, local and everything." See TR. at 35. We fail to see how this trend would serve a customer whose only interest is in a basic, low-cost connection to the network and unlimited local calling, or why it is in the public interest to use universal service funds to support such services.

12. We find that FTC has not met its burden of establishing that the public interest will be met by granting its request for designation as an ETC. FTC has stated



that it currently provides or will provide the nine services identified by the FCC as being those services supported by the federal universal service support mechanism. TR. at 13. However, FTC has provided no specific information in its application, testimony, or exhibits that would assist the Commission in conducting the required specific, fact-intensive analysis to determine whether the public interest will be served by this designation. Specifically, as pointed out by Staff witness Mr. McDaniel and SCTC witness Mr. Brown, FTC has provided no financial information, no specific build-out plan, no information on the number of unserved customers, no proposed new service offerings or proposed lower rates, no information on how federal USF will be specifically allocated to building of cell towers, etc. TR. at 98, 142, 243-244. FTC has not demonstrated, as Virginia Cellular did, that it will serve areas that are currently unserved by wireline carriers. See Virginia Cellular at 14, fn 88. In fact, the uncontroverted evidence of record indicates that high quality service is currently available from FTC's parent company throughout the portion of FTC's service area served by Farmers Cooperative. TR. at 11. In addition, there is evidence in the record that wireless service is available from other carriers in at least some of the areas proposed to be built out by FTC. TR. at 99-100. In contrast, FTC has provided no specifics as to whether the areas it proposes to serve are currently unserved or even underserved. The only evidence is that *FTC itself* would be able to provide better service than *it* is currently providing in some of these areas if it were to receive federal funding. TR. at 14-15, 43. This is not a sufficient showing to justify the significant expenditure of public funds.

13. Counsel for FTC appears to take the position that FTC has provided information, including costs, population densities, and build-out plans, because it provided some data to the Commission in response to “interrogatories.” See TR. at 246-247. Some of this information was apparently provided to the Staff on the eve of the hearing. See TR. at 239. None of this information, however, appears in the record of this case. Counsel cannot bootstrap information into the record merely by asking a witness if he received information outside the hearing. See TR. at 246-247. It is incumbent upon counsel to introduce any such information into the record of the case so it may be examined not only by the Commission and its Staff, but by other parties. FTC cannot avoid scrutiny of any data it is relying upon in the case by filing it in response to interrogatories rather than as part of its application, testimony or exhibits, and failing to introduce it into the record so it may properly be objected to or contravened by opposing parties. As Mr. McDaniel noted, this information did not appear in FTC’s application. See TR. at 243-244. Nor did it appear in Mr. McCutchen’s testimony or any exhibits submitted for the record at the hearing. There is no way for the Commission to determine the sufficiency of the information, because it is not evidence in this case.

14. FTC has not demonstrated that its designation as an ETC in areas served by rural telephone companies would serve the public interest. Even if FTC could demonstrate additional benefits, these may well be temporary, because FTC has not addressed the very real risks that spreading finite universal service resources too thin will create to critical “carrier of last resort” principles. TR. at 88.

15. Designating FTC as an ETC could well have a significant adverse impact on the public interest in South Carolina. See TR. at 150. Explosive growth in the size of the federal USF could threaten the long-term viability of the fund, thereby jeopardizing the continued provision of affordable basic local exchange service to rural subscribers. TR. at 150. Both Mr. Brown and Mr. Oliver testified that, if the Commission grants FTC's application, other wireless service providers will be compelled to seek ETC designation as well in order to remain competitive with each other. TR. at 168-169, 79-81. Mr. Brown estimated that if all wireless providers in South Carolina were to apply for and receive ETC status, the impact on the high cost support program would be approximately \$75.7 million per year. TR. at 80. If all wireless providers nationwide were to apply for and receive ETC status, the annual funding level of the high cost support program, which is currently \$3.4 billion, would increase by over \$2 billion. TR. at 80. The federal USF is and should be treated as a scarce national resource.

16. Approval of FTC as an ETC for federal USF purposes is likely to have an impact on the State USF. TR. at 159-160.

17. We find that FTC has not provided sufficient information that would enable the Commission to grant its application, and FTC's request for designation as an ETC within its service area in the State of South Carolina is, therefore, denied. Furthermore, the costs and risks associated with granting FTC's request far outweigh any asserted benefits.

IT IS THEREFORE ORDERED THAT:

1. FTC's request for designation as an eligible telecommunications carrier within its service area in the State of South Carolina is denied. FTC has failed to meet its burden of proving that designation of FTC as an additional ETC, especially in those areas served by rural telephone companies, is in the public interest.

2. We establish the policies and requirements for designating ETCs as described herein.

3. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

/s/  
Randy Mitchell, Chairman

ATTEST:

/s/  
O'Neal Hamilton, Vice-Chairman

(SEAL)